

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 28, 1999

IN RE:)	
APPLICATION OF BEN LOMAND)	
COMMUNICATIONS, INC. FOR A CERTIFICATE OF)	DOCKET NO. 98-00600
PUBLIC CONVENIENCE AND NECESSITY TO)	
PROVIDE INTRASTATE TELECOMMUNICATIONS)	
SERVICES AS A COMPETING)	
TELECOMMUNICATIONS SERVICE PROVIDER)	

**ORDER GRANTING CERTIFICATE OF
CONVENIENCE AND NECESSITY**

On February 16, 1999, this matter came before the Tennessee Regulatory Authority ("Authority"), upon the Application of Ben Lomand Communications, Inc. ("BLC") for a Certificate of Public Convenience and Necessity as a Competing Telecommunications Service Provider to offer a full array of telecommunications services within the State of Tennessee (the "Application"). The Application was made pursuant to Tenn. Code Ann. § 65-4-201 *et seq.*

LEGAL STANDARD FOR GRANTING CCN

BLC's Application was considered in light of the criteria for granting a certificate of public convenience and necessity ("CCN") as set forth in applicable statutes. Tenn. Code Ann. § 65-4-201 provides, in part:

(a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application

and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate . . .

* * *

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services.

An authority order, including appropriate findings of fact and conclusions of law, denying or approving, with or without modification, an application for certification of a competing telecommunications service provider shall be entered no more than sixty (60) days from the filing of the application.

(d) Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on June 6, 1995.

In addition, pursuant to Tenn. Code Ann. § 65-5-212, competing telecommunications providers are required to file with the Authority (1) a plan containing the provider's plan for purchasing goods and services from small and minority-owned telecommunications businesses; and (2) information on programs that might provide technical assistance to such businesses.

INTERVENORS

Public notice of the hearing in this matter was made by the Authority's Executive Secretary, pursuant to Tenn. Code Ann. § 65-4-204. No interested persons sought intervention prior to hearing.

BLC'S HEARING

At the hearing held on December 15, 1998, BLC was represented by James W. Dempster, Attorney at Law, 118 East Main Street, P.O. Box 332, McMinnville, Tennessee 37111-0332. In addition, Mr. Calvin Levoy Knowles, Executive Vice President of BLC, Ms. Gail Woodlee, Controller of Ben Lomand Rural Telephone Cooperative ("BLRTC"), Mr. Rodney Schlimmer, Central Office Supervisor of BLRTC, and Ms. Judy Kelsey, Operations Manager of BLC, presented testimony and were subject to examination by the Authority's Directors. Upon BLC's conclusion of the proof in its case, the Authority requested that BLC prepare a legal brief to address certain issues relative to the corporate relationship, for telecommunication purposes, between BLC and BLRTC. On February 1, 1999, BLC responded with its brief on those issues.

At a regularly scheduled Authority Conference held on February 16, 1999, the Directors voted unanimously to approve the Application. After an initial determination that the *Telephone Cooperative Act of 1961*, as a matter of legislative policy, provides telephone cooperatives such as BLRTC with certain privileges and protections which are not enjoyed by public utilities, and the resulting conclusion that BLC has a separate corporate identity from BLRTC for

telecommunications purposes¹, the Directors made the following findings of fact and conclusions of law:

I. APPLICANT'S QUALIFICATIONS

1. Formed under the laws of the State of Tennessee, BLC is a wholly-owned subsidiary of Ben Lomand Rural Telephone Cooperative, Inc. ("BLRTC"). Since September, 1995, BLC has been an approved long distance reseller.

2. The complete street address of BLC's principal place of business is 1111 Smithville Highway, McMinnville, Tennessee 37110, the phone number is (931) 668-101 and the fax number is (931) 668-1013. BLC's counsel is James W. Dempster, Attorney at Law, 118 East Main Street, P.O. Box 332, McMinnville, Tennessee 37111-0332.

3. The Application and supporting documentary information existing in the record indicate that BLC has the requisite technical and managerial qualifications necessary to provide telecommunications services within the State of Tennessee on a facilities-based and resale basis.

4. BLC has the necessary capital and financial capability to provide the services it proposes to offer. At the hearing, BLC agreed that there would be no cross-subsidization between BLC and BLRTC.² To guard against any such anticompetitive cross-subsidization, BLC

¹ During deliberations on this matter, Chairman Malone stated: "Ben Lomand Rural Telephone Cooperative, Inc. is not subject to regulation by this Agency. Section 65-29-104 read in combination with Section 65-29-132, does not prohibit a cooperative such as Ben Lomand Rural Telephone Cooperative, Inc. from owning stock in a corporation such as Ben Lomand Communications, Inc." Director Greer voiced certain concerns relative to the inequity between the *Telephone Cooperative Act of 1961* and the *Telecommunications Act of 1995*, but stated that "legally and statutorily, I believe I have no alternative but to grant this application." Transcript of February 16, 1999 Authority Conference, p. 45 & 48, respectively.

² Testimony of Executive Vice President Levoy Knowles at the Hearing of December 15, 1998; see p. 8-21 of the transcript of such date. See also statements of BLC Counsel James W. Dempster in response to questions from Director Greer on p. 35-36.

has offered to make its books and records available to the TRA. In addition, the books and records of Ben Lomand Rural Telephone Cooperative, Inc., will be made available to the Agency for the purpose of determining Ben Lomand Communications, Inc.'s compliance with the cost allocation plan relied on by it in these proceedings.

5. BLC has represented that it will adhere to all applicable policies, rules and orders of the Authority.

II. PROPOSED SERVICES

1. BLC intends to offer a full array of telecommunications services such as would normally be provided by an incumbent local exchange telephone company including, but not limited to, dedicated and switch access services, private line services, local dial tone, toll services, and any other service as it becomes available. BLC will offer these services within the counties of Warren and White as permitted by state and/or federal law.

2. Except as may be authorized by law, BLC does not intend to serve any areas currently being served by an incumbent local telephone company with fewer than 100,000 total access lines where local exchange competition is prohibited by Tenn. Code Ann. § 65-4-201(d).

III. PERMITTING COMPETITION TO SERVE THE PUBLIC CONVENIENCE AND NECESSITY

Upon a review of the Application and the record in this matter, the Authority finds that approval of BLC's application would inure to the benefit of the present and future public convenience by permitting competition in the telecommunications services markets in the State and by fostering the development of an efficient technologically advanced statewide system of telecommunications services.

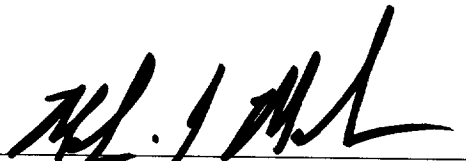
IV. SMALL AND MINORITY-OWNED TELECOMMUNICATIONS BUSINESS PARTICIPATION PLAN & BUSINESS ASSISTANCE PROGRAM

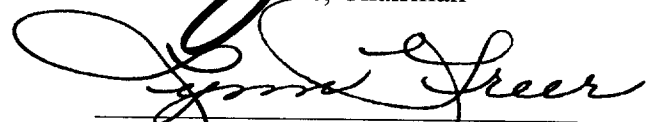
1. BLC has filed a satisfactory small and minority-owned telecommunications business participation plan, pursuant to Tenn. Code Ann. § 65-5-212 and the Authority's Rules.

2. BLC has acknowledged its obligation to contribute to the funding of the small and minority-owned telecommunications business assistance program, as set forth in Tenn. Code Ann. § 65-5-213.

IT IS THEREFORE ORDERED THAT:

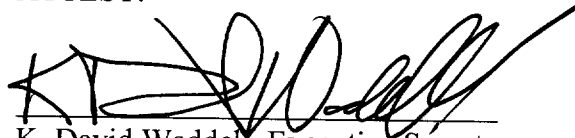
1. BLC's Application is approved as applied for;
2. Any party aggrieved with the Authority's decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.


Melvin J. Malone, Chairman


H. Lynn Greer, Jr., Director


Sara Kyle, Director

ATTEST:


K. David Waddell, Executive Secretary

CONCURRING OPINION

H. Lynn Greer, Jr.

Docket No:98-00600


**Application of Ben Lomand Communications, Inc.
for a Certificate of Public Convenience and
Necessity to provide Intrastate
Telecommunications services as a competing
telecommunications service provider**

On February 16, 1999, I voted to approve a Certificate of Convenience and Necessity (CCN) for Ben Lomand Communications, Inc., a for-profit subsidiary of Ben Lomand Rural Telephone Cooperative. The certificate granted to Ben Lomand will allow the for-profit subsidiary to compete in the telephone business against other telephone providers while at the same time allowing the not-for-profit cooperative to protect its territory from outside competition.

I do not doubt the financial, managerial and technical capabilities of Ben Lomand Communications to operate their for-profit subsidiary. In fact, I believe they are a very fine and aggressive company with all the means required to operate a successful telephone company. I take no issue with the company's ability to satisfy the statutory requirements for certification; my concern deals with the fairness and "level playing field" issue.

Personally, I have a philosophical problem with a not-for-profit entity being able to form a for-profit subsidiary and enter into competition with other for-profit entities while not allowing those same for-profit entities to compete in the territory of the not-for-profit entity.

I realize that the General Assembly made a policy decision in this area, but I am quite certain that neither this particular circumstance nor its implications were considered when this law was enacted in 1961. The act passed in 1961 was passed twenty three years prior to the divestiture of AT&T in 1984, thirty four years prior to the enactment of Tennessee's Telecommunications Act in 1995, thirty five years prior to the federal government's enactment of the Telecommunications Act of 1996 and thirty eight years prior to the TRA's action on February 16, 1999. Who among us would not like to be allowed to go into competition with other telecommunications providers while at the same time being allowed to protect our own franchised territory?



H. Lynn Greer, Jr., Director

April 28, 1999